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In the Supreme Court of the United States

No. 413

OCTOBER TERM, 1962

UNITED STATES OF AMERICA, for the Use and Benefit of MILES LUMBER COMPANY, a Corporation, and MILES LUMBER COMPANY, a Missouri Corporation, in Its Individual Capacity,
Petitioners,

vs.

HARRISON AND GRIMSHAW CONSTRUCTION COMPANY, a Partnership or Joint Venture; HARDY PLYWOOD AND DOOR, INC., a Corporation; TEXHOMA DISTRIBUTORS, INC., a Corporation; MARSHALL WHOLESALE LUMBER COMPANY, INC., a Corporation; CARL MORRIS, an Individual Doing Business As Carl Morris Construction Company; STANDARD ACCIDENT INSURANCE COMPANY, a Corporation; NATIONAL SURETY CORPORATION, a Corporation; AETNA CASUALTY & SURETY COMPANY, a Corporation; NEW AMSTERDAM CASUALTY COMPANY, a Corporation; THE TRAVELERS INDEMNITY COMPANY, a Corporation; PAUL W. ANDERSON; NATHAN A. BURKHAM; W. G. (Bud) KILLION; MARJORIE ANDERSON; FLORINE BURKHAM; BETTY ANN KILLION; and DANIEL E. HARDY,
Respondents.

SEPARATE RESPONSE TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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HARRISON AND GRIMSHAW CONSTRUCTION COMPANY, a partnership, or Joint Venture, *et al.*, *Respondents*.

SEPARATE RESPONSE TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

1. *Parties.* This response is made in behalf of the prime contractor on a Capehart Housing Project and four sureties upon the prime contractor's bond, and in behalf of the Travelers Indemnity Company, surety upon a subcontractor's bond, The Travelers Indemnity Company does not admit said bond has any validity.

2. *There Is No Genuine Conflict Among the Circuits.* The decision for which petitioner seeks certiorari is reported in 365 F. 2d 363 (10th Cir.). Petitioner (pp. 6-7) quotes from *Lasley* v. *U. S.*, 285 F. 2d 98 (5th Cir.) in support of its contention that there is a conflict among the circuits. In the *Lasley* case the issue was one of Federal Court jurisdiction. In the portion of the opinion quoted by counsel the court did find that the Miller Act would confer such jurisdiction in a suit on a Capehart Bond. It need not be contended that this part of the opinion is *obiter dictum*, but this part of the holding was certainly not necessary for the decision. The relative unimportance attached to the applicability of the Miller Act appears from the brief of the appellee in that case (Appendix A), and the further statement of the Court of Appeals for the Fifth Circuit, which follows the portion of the opinion quoted by petitioner as holding that the Miller Act would confer jurisdiction. The court said:

> "However, even assuming, arguendo, that this is not true, we find that the district court nevertheless had jurisdiction to entertain this suit under the concurrent jurisdiction conferred upon it by 28 U. S. C. A. Sec. 1352. For this reason, there is no merit in the arguments put forth by Appellants."

In our case, aside from venue questions, federal court jurisdiction is not involved. In alternative to Miller Act jurisdiction claimed in the first count, the second count of petitioner's amended complaint claims jurisdiction as against these respondents, on the ground of diversity of citizenship.

Petitioner cites also some district court decisions holding that the Miller Act applies. The Louisiana decision (*Autrey v. William, et al.*, 185 F. Supp. 802) is from the Fifth Circuit, and the scanty opinion throws little light on the question. The decision from the Maryland District Court (*United States, ex. rel. Acme Furnace Fitting Co. v. Ft. George G. Meade Defense Housing Corp.*, 186 F. Supp. 639) also involved the question of Federal Court jurisdiction. The soundness of the opinion might well be doubted from its remarkable conclusion that the claimant could proceed both in the state court with a lien foreclosure against a Capehart Project, and at the same time rely on the Miller Act. Again the court's own lack of conviction on the point appears from its further statement in the opinion. (loc. cit. 649)

> "However, even if this conclusion be incorrect, since it presently appears from the pleadings that diversity of citizenship and the requisite amount in controversy exist, the court will—if this be the case and the use-plaintiff so desires—entertain pursuant to section 1653 of Title 28 U. S. C. A. a motion by said plaintiff to amend its pleadings to allege formally jurisdiction, in addition, under Title 28 U. S. C. A. Sec. 1352 in order to permit a ruling on the merits."

The only other decision on which plaintiff relies is *U. S. v. Progressive Contractors, Inc.*, 196 Fed. Supp. 171. In that opinion, the North Dakota District Court held that action could be maintained on a Capehart bond without giving the notices therein required, if plaintiff

gave the notice required by the Miller Act. (Appendix "B") This decision was promptly reversed by the Court of Appeals for the 8th circuit. *Continental Casualty Co. v. United States for Use, etc.*, 305 F. 2d 795.[1]

The so-called "conflict" among the circuits is thus so narrowed as to seem more apparent than real. Holding that the Miller Act confers jurisdiction over an action on a Capehart bond is the District Court decision from Maryland, and the *Lasley* opinion from the Court of Appeals for the 5th Circuit. The rather scanty consideration given to the Miller Act in the *Lasley* case is quite understandable. The problem there was one of federal court jurisdiction. In both of these cases the same decision would follow whether the Miller Act applied or not.

In vivid contrast are the opinions of the Court of Appeals for the 8th and 10th Circuits. Independently of each other, but applying almost identical logic and reasoning, and indicating exhaustive research and full consideration of the problem, these courts held that the Miller Act does not apply to Capehart projects. These parallel decisions each contain a full discussion of the problem. In both, we find the same analysis, the same rationale, and the same end results. Both conclude that the Miller Act does not apply. In passing it might also be noted that District Courts in the 1st and 2nd Cir-

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1. We understand that application for certiorari has been made to this Court in this case.

cuits have reached the same conclusion." (Appendix "C") In these circumstances it may well be doubted that petitioner has presented any such genuine conflict among the circuits as would justify the issue of certiorari.

3. *The Question Is No Longer of Such Importance as to Justify the Issue of Certiorari.* If additional Capehart Projects were to be created, with possible repetitions of the same legal question, some substance might be found in petitioner's contentions in paragraphs 2 and 3 (pp. 8-9) that a final decision by this court construing the Capehart Act in conjunction with the Miller Act would be important. However, the United States Senate has recently held extensive hearings on the Capehart Act. We understand that the Congress has not authorized further Capehart construction, but, on the contrary, has authorized the expenditure of appropriated funds for direct government construction of housing on military installations. All such construction would, of course, be under the Miller Act. At this time the likelihood that the question involved herein will repeatedly arise would seem too doubtful to justify certiorari.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for the writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX "A"

Quotations from brief of Appellee in *Lasley* v. *United States*, 285 F. 2d 98.

The *entire* argument of the Appellee in the *Lasley* case as to the applicability of the Miller Act was embraced in the following (after quoting the Act):

> "We submit this clearly indicates the Public character of a Capehart Project, and the intent of Congress when this law was enacted."

This brief paragraph was followed by substantial argument that the Capehart Bonds in the *Lasley* case "are within the purview of Sec. 1352 of Title 28 U.S.C." The Appellee concluded his argument with the following statement:

> "It is therefore respectfully submitted that the Court has jurisdiction not only under the Miller Act, but also under 28 U. S. C. 1352 and further that the suit lies under the terms of the bond sued upon, in the United States District Court in which the project is situated, which in this case is the Western District of Texas, El Paso Division."

Both the Appellee and the court in the *Lasley* case were concerned with jurisdiction of the Federal Court. Reliance was placed not only on the Miller Act, but also upon 28 U. S. C. 1352.

APPENDIX "B"

Excerpts from opinion in 10th Circuit, *United States for Use of Miles Lumber Company* v. *Harrison & Grimshaw Construction Company, et al.*, 305 F. 2d 363.

We are at loss to comprehend the footnote which appears on page 5 of the Petition for Certiorari. Plaintiff's amended complaint nowhere alleged the giving of the notices required by the Capehart Bond. We do not understand that in considering certiorari this court will pass on questions of specific facts or review evidence. However, if there be any doubt that the decision for which certiorari is asked involved the necessity of giving the notices required by the Capehart Bond, we excerpt the following from the opinion of the Court of Appeals:

> "If the Miller Act controls, the notice given prior to suit was sufficient whereas, if it does not, that notice was insufficient."
>
> . . . . . .
>
> "A prerequisite to suit on the bond is notice to any two of the following, 'the principal, any one of the Obligees, or the Sureties above named' before the expiration of 90 days after the performance of the last work or the supplying of the last material or before the expiration of the time for filing a lien under state law. The bond provides that 'either the giving of notice, or the filing of lien, in accordance with the pertinent lien law of the place where the project is located is a sufficient notice.' Miles did not give the notice required by the bond.
>
> . . . . . .

"Under the Miller Act notice of a claim by a supplier of labor or material to a subcontractor need be given only to the prime contractor. The bond before us requires notice to two of its parties."

The court concluded:

"The notice provisions of the bond govern. As these were not satisfied, Count 1 of the complaint states no claim and the judgment of dismissal was proper."

APPENDIX "C"

District Court decisions from 1st and 2nd Circuits holding that Miller Act does not apply:

As to the First Circuit, see *U. S. For General Acceptance v. Maguire Homes, Inc.*, 186 F. Supp. 659 (Mass.); *Octeau v. American Surety Co. of New York* and *Westinghouse Electric Supply Co., et al., v. Maguire Homes, et al.*, in the United States District Court for the District of Rhode Island, cases numbered 2419, 2449 and 2458.

From the Second Circuit, see unreported decisions of the United States District Court for the Northern District of New York in case No. 7969, *U. S. for the Use of Glens Falls Electric Supply Co., Inc., v. S. S. Silberblatt, Inc., et al.*, and case No. 7970, *U. S. for Use of Clinton Electric Supply Corp. v. S. S. Silberblatt, Inc., et al.*